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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
Petitioners,

v.

GROKSTER, LTD., ET AL.,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR CREATIVE COMMONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Creative Commons is a nonprofit corporation that enables artists and authors to mark their creative work with the freedoms that they intend the work to carry.[1] Through a site on the World Wide Web, http://creativecommons.org, creators are invited to choose a copyright license to attach to their own creative work. That license reserves some rights to the author, or copyright holder, while granting other rights to the public. Using our licensing tool, a copyright holder can choose whether to authorize commercial use of the licensed content, whether to permit derivative use of the licensed content, and, if derivative use is allowed, whether to require that works that build upon the licensed work also be made available under a similarly free license. These licenses then travel via Internet hyperlinks with the copyrighted content, helping others to know, and to rely upon, the freedoms they secure.

In the two and a half years since Creative Commons launched its licensing project, more than 10,000,000 objects have been marked with Creative Commons licenses according to Yahoo! Search.[2] The vast majority (75%) reserve to the copyright owner commercial rights to the content, while authorizing the public to use the work for noncommercial purposes. Almost 65% grant derivative rights, though half of those condition that grant upon the requirement that the derivative works be licensed under a similarly free license. And about 2% purport to dedicate their work to the public domain.[3] More than 70 countries around the world are currently adapting Creative Commons licenses to their local jurisdictions. Eighteen have

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[1] In accordance with Rule 37.6, Amicus states that that no counsel for any party has participated, in whole or in part, in the writing of this brief. Counsel for Amicus is chairman of Creative Commons. He is also on the Board of the Electronic Frontier Foundation, and executive director at the Stanford Center for Internet and Society, co-counsel for Respondent StreamCast Networks. Creative Commons has paid for the costs of preparing this brief. The parties have consented to the filing of this brief.

[2] See the estimate derived from the Yahoo! Engine, February 18, 2005, Creative Commons Blog, *at* link # 20.

[3] For a distribution of licenses, *see* Appendix A.

already completed that process, and an equal number will complete it by the end of this year.

The project is the recipient of numerous awards, including the Ars Electronica Award. Its licenses have been adopted by a wide range of artists, educators, and scholars. The MIT OpenCourseWare project, for example, licenses its content under Creative Commons licenses. So too does the Public Library of Science, chaired by Nobel Prize winner Harold Varmus. University of Chicago professor Gary Becker and Judge Richard Posner publish a blog licensed under a Creative Commons License. *See* Becker-Posner Blog, *at* link # 1. As part of a feature about Creative Commons, Wired magazine has released a CD with 16 tracks licensed under a Creative Commons license by artists including, among others, the Beastie Boys, David Byrne, Gilberto Gil, Chuck D, and Le Tigre. Scientific American has cited the project as "a welcome arrival" to the intellectual property landscape. *See Beyond the Big-©*, Scientific American (Feb. 14, 2005). The Brazilian government has offered the project as a model for intellectual property protection in the 21st century. *See Establishing a "Development Agenda" for the World Intellectual Property Organization*, *at* link # 2. The project has been endorsed by former MPAA president Jack Valenti, and by former president of the RIAA Hilary Rosen. *See* Richard Koman, *Returning Creativity to the Commons*, *at* link # 3 (Valenti); Hilary Rosen, *How I Learned to Love Larry*, Wired 12:11 (Nov. 2004) *at* link # 4.

The resolution of this case could significantly affect the interests of Creative Commons. While Creative Commons condemns copyright infringement, the system that it has developed depends upon tools, including peer-to-peer technologies, that enable creators to cheaply distribute their own content and to invite others to share and build upon it. A resolution of this case that restricted the availability of such tools would significantly compromise the objectives of Creative Commons.

Creative Commons thus submits this brief to aid the Court's understanding of the consequences of its intervention, were it to decide to reverse the decision of the Ninth Circuit below.

STATEMENT

At the center of *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), was an extraordinary creator, Mr. Fred Rogers. Rogers produced children's television programming. His most famous work, "Mister Rogers' Neighborhood," won dozens of awards, including four Emmys. The show was the longest running program on PBS when its last episode was recorded in 2001. Rogers was, by any metric, a cultural and commercial success.

Yet as this Court noted in *Sony*, Rogers practiced his success differently from most. *Sony*, 464 U.S., at 445. In particular, unlike many in the television and film industry at the time, Rogers did not oppose technologies, such as the VCR, that "allow[ed] a person to be more active in the control" of how his creative content is accessed or consumed. *Id.* at 445 n.27. Rogers, of course, did not endorse copyright infringement. But he supported a technology that made it easier for families to tape his copyrighted content, at least for "noncommercial use." *Id.* at 445.

The Internet has produced millions of "Mister Rogers." Millions offer their creative work on the Internet for free. Millions invite others to build upon and share that work, without first requiring permission from them, the copyright owner. Some of these creators believe that this strategy will earn them commercial success, as their talent is recognized and demand for their work grows. *See, e.g.,* Andy Raskin, *Giving it Away (for Fun and Profit)*, Business 2.0, May 2004, at 112. Some offer their work with no expectation of commercial gain, but again with the idea that others be able to build upon and share the creativity that they offer. From authors to musicians to software developers to filmmakers, the Internet is filled with copyright holders who have chosen to exercise the exclusive rights that copyright secures to them in ways that invite others to share or build upon their work without needing to seek permission first.

A growing number of these millions use the technology at issue in this case — peer-to-peer ("p2p") — to disseminate their work.[4] For many of them, effective dissemination would be impossible without p2p. Contrary to the arguments of Petitioners and their Amici, *see, e.g.*, Brief of Professors Peter S. Menell, et al., as Amici Curiae in Support of Petitioners, at 27 n.11, without this technology a vast range of creative work simply could not be made available using the Internet. These creators depend upon the further spread of p2p technology for access to their work to grow. The choice to expand secondary liability to cover p2p technologies is therefore a choice to disable effective channels on the Internet for this class of speech.

Of course, the inverse is true as well: the choice *not* to expand secondary liability to cover p2p technologies will also have consequences for the mix of speech available on the Internet. Without further restriction, p2p technologies will continue to be used by many to infringe the copyrights of others. This illegal use will continue to put pressure on many existing and traditional business models for distributing copyrighted content. The choice not to expand secondary liability may therefore mean that fewer artists and authors will be able to create according to these business models. The data are uncertain, *compare* Stan J. Liebowitz, *Pitfalls in Measuring the Impact of File-Sharing* (2004) *at* link #5 (concluding that file

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[4] "Peer-to-peer" refers to a family of architectures for distributing content on the Internet. As Kevin Werbach describes,

> P2P services differ in their technical architecture. None of the currently popular systems employ Napster's central directory. Some use dynamically-created supernodes, which turn users with high-quality connections into temporary directory nodes for other users. Other systems, such as Gnutella, relay requests from one node to another, until the request finds a directory including the desired file. BitTorrent ... further distributes the directory function through the use of multiple trackers, which keep track of pieces of files.

Kevin D. Werbach, *The Implications of Video P2P on Network Usage*, Video Peer to Peer: Columbia Institute for Tele-Information 8 (2005), *at* link # 7.

sharing harms music sales) *with* Felix Oberholzer and Koleman Strumpf, *The Effect of File Sharing on Record Sales An Empirical Analysis* (2004) *at* link # 6 (concluding that file sharing does not harm music sales), but it is certainly plausible that the choice not to expand secondary liability will narrow the commercial opportunity for this class of creative work, even while expanding the opportunity for others.

Creative Commons absolutely condemns the illegal use of p2p technologies. The infringement of copyright is not just illegal, it has also threatened the future of the free Internet as regulators are driven to respond. As Creative Commons itself depends upon a healthy copyright system, and as it offers free copyright licenses that authors expect users to respect, Creative Commons emphatically does not endorse copyright infringement of any sort, including through the use of p2p technologies.

But just as gun owners who defend the legal use of guns are not endorsing cop killers, or free speech activists who attack overly broad restrictions on pornography are not thereby promoting the spread of child pornography, so too is the defense of p2p technologies not an endorsement of "piracy." There is more at stake in this case than the acknowledged wrong of "piracy." *See* Lawrence Lessig, *Free Culture* 10, 18, 62, 63, 64, 65, 66, 139, 255 (2004) (describing "piracy" as "wrong"). And unless these broader issues are kept in view, this Court could be drawn into a decision that could harm the wide range of creators who depend upon both copyright law *and* p2p technology to effect the distribution of their creative work.

Petitioners have asked this Court to make a choice. By demanding expanded secondary liability to cover p2p technologies, they have in effect asked this Court to choose one important class of creative work *over* another important class of creative work. They insist that the free speech interests that they promote are more important than the free speech interests that they would burden. And they insist that any cost that such regulation would create — for both technology industries, and the creators that depend upon their technologies — is outweighed by the benefit such regulation would produce for

them. Armed with the calculations of Nobel Prize winning economists, they ask this Court to don green eyeshades, and "balance," *see* Pet'r. MGM Studios Br. at 2, 17, 23, 27, 35-36, 50, the interests at stake in this case, firmly believing that such a balance favors them.

The Petitioners and their Amici are in the wrong forum. This Court is not the Economist General. Its function, in the context of copyright law, is not to weigh one set of important free speech interests against another set of important free speech interests. As *Eldred* v. *Ashcroft*, 537 U.S. 186 (2003), made plain, so long as Congress does not change the "traditional contours of copyright," *id.*, at 221, the task of balancing free speech interests belongs to *Congress*. Within the limits of the Constitution, and except where Congress has expressly provided, *see*, e.g., 17 U.S.C §107 (2005) ("fair use"), that special deference to Congress's judgment entails a corollary responsibility: that Congress, rather than the courts, should weigh the complex of interests involved in deciding how best to balance changes in technology against the continued need for copyright protection.

The only question properly before this Court is therefore the exceedingly narrow question framed by *Sony*: whether the challenged technology is "capable of substantial noninfringing uses," 464 U.S., at 442. If it is, then jurisdiction over the question of whether that technology should be further regulated shifts from the judicial branch to the policymaking branch. On that standard, this case is far simpler than *Sony*: There is no doubt that the technologies at stake here have produced, and will continue to produce, a substantial range of important, and noninfringing uses. If Congress nonetheless wants to burden those uses, that is a policy choice for Congress to make.

SUMMARY OF ARGUMENT

Much of the discussion about p2p technologies has assumed that the speech effects of any decision in this case will be trivial. This assumption is false. For large video and audio files — which will comprise an increasingly important category of Internet speech — p2p networks are the *only* economical method of distribution for many commercial and noncommercial

speakers. For this class of content, the "cheap speech" virtues of the Internet — virtues that this Court has found so central to First Amendment analysis of Internet issues — are at risk from a decision that burdens p2p technologies. That risk can be mitigated only by a careful balancing of the interests at stake. But such balancing is the responsibility of Congress, not this Court.

ARGUMENT

Though the Internet is "free," the Internet is expensive. The most common mode by which content gets distributed — through "client-server" distribution — forces the distributor of content to bear the bandwidth costs of distribution each time a file is downloaded.[5] For large files, distributed widely, that cost can quickly become prohibitive for many creators.

P2P technology shifts these costs of distribution from the distributor to the recipients. Bandwidth costs are thus shared among those who choose to receive the file. This architecture of distribution enables many who otherwise could not afford the costs of client-server distribution to distribute creative work. It thus opens a channel for communication that otherwise would not exist.

It is this shift in the costs of distribution — not copyright infringement, or "piracy" — that is the essence of p2p technology. *Every* file distributed through p2p technology exploits this feature of its architecture; only *some* of the files distributed using p2p technology are in violation of anyone's copyright. More importantly, p2p does nothing to disable self-help by copyright holders to protect their content, through technologies such as encryption: if a movie file is encrypted at one end of a p2p pipe, it will be encrypted at the other end as well.[6] The

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[5] This description ignores the effect of network caches, but as the publisher of content can't ensure the benefit of a cache, the simplification does not change the analysis.

[6] As many analysts have described, encryption technologies could protect the content industry against the threats presented by p2p. The key is "token" based encryption techniques. As described by Microsoft, for example, in these techniques, content is wrapped in a protective encrypted layer. The content can't be accessed without a "token" or "key." By separating the

only feature of p2p distribution that is common to all p2p distribution is where the cost of distribution falls: to recipients collectively rather than senders individually.

This Court has historically been sensitive to costs imposed upon protected speech as the consequence of legal regulation. It has been especially sensitive in the context of the Internet. Where it has applied ordinary First Amendment review of speech restricting regulations, this Court has not hesitated to impose stringent limitations to assure that speech burdens are limited — even when the underlying interests are as important as protecting children. *See, e.g., Ashcroft* v. *ACLU*, 124 S. Ct. 2783, 2791 (2004) ("purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished"). But where the primary jurisdiction to weigh the speech interests affected by its regulation lies with Congress, this Court has adopted almost *Chevron*-like deference to congressional judgments about how best to balance the costs of copyright regulation. *Sony,* 464 U.S., at 431 ("consistent deference"); *Eldred*, 537 U.S., at 204-05 ("defer substantially to Congress") (citing *Sony,* 464 U.S., at 429 ("it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors ... in order to give the public appropriate access to their work product.")).

That deference implies responsibility. As Amicus demonstrates below, there is no doubt that expanding secondary liability in this case will burden legitimate and important free speech interests. There is no doubt that weighing the interests that will be burdened against the interests that will be advanced requires complex judgments of both economics and value. And there is no doubt that any decision to expand secondary liabil-

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content from the token, such a system enables the encrypted content to be shared freely — including on p2p systems — while access to the key is controlled. *See* Microsoft Windows Media DRM FAQ, *at* link # 21. For an analysis of how such a system might support the content industry, *see* Digital Media Project, *Content and Control* Appendix III (2005), *at* link # 22 (describing "P2P Stores").

ity will invite a swarm of litigation surrounding the many different technologies that might be said to facilitate copyright infringement by others.

These certainties confirm this Court's judgment in *Sony*: that when "major technological innovations alter the market for copyrighted materials," 464 U.S., at 431, producing a "calculus of interests," "never contemplated" by Congress, *id.*, it is Congress, at least at first, and not this Court, that "has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests." *Id.* If courts are to defer to Congress's judgment about the balance of free speech interests affected by copyright law, *Eldred,* 537 U.S., at 204-05, then that deference only makes sense if it is indeed *Congress* that has made the judgment.

I. P2P TECHNOLOGIES ENABLE A KIND OF PROTECTED SPEECH THAT WOULD OTHERWISE BE ECONOMICALLY INFEASIBLE

The Internet is built upon a set of free protocols designed to enable packets of data to travel across interconnected networks. *See Reno* v. *ACLU*, 521 U.S. 844, 850-54 (1997). Any computer connected to that network can freely use these protocols to exchange data. But the free use of protocols does not translate into free use of the physical network upon which those protocols operate. Practically all providers of Internet access meter the usage by their subscribers. That metering imposes an economic constraint upon the opportunity of creators to use the Internet to distribute creative work.

This constraint is ordinarily insignificant for most websites today. The files normally distributed on the web today are quite small; most of the bandwidth limits provided by web hosting companies are generous. Thus for the content that has dominated Internet publication so far, the client-server model of distribution is perfectly adequate.[7]

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[7] Based on the data from Hostchart.com, *at* link # 23, and Host Review, *at* link # 24, current bandwidth costs are approximately $30 per month for 100 gigabytes. Yet even today, an unexpectedly popular file can incur signifi-

But for an increasingly important class of Internet content, the client-server model of distribution is disabling. For anyone offering large files — for example, high quality video — the cost of providing access through the traditional web-hosting model of distribution is prohibitive. The bandwidth costs of distributing a single movie to a single user, for example, can be the equivalent of more than 10,000 people accessing just one webpage. Kevin D. Werbach, *The Implications of Video P2P on Network Usage*, Video Peer to Peer: Columbia Institute for Tele-Information (2005), *at* link # 7. Without p2p technologies, the Internet would be an expensive vehicle for distributing such content.

For commercial distributors, such costs can be recovered in the price charged for the content distributed — though increased costs will reduce the demand for the distributed product. But for individual speakers who want to distribute such content freely — either because they believe that they will indirectly commercially benefit, or because they have a non-commercial purpose in distributing their content — the traditional web-hosting model of distribution is infeasible for large file distribution.

P2P technologies change these economics. By dividing the burden of content distribution among those who download, or consume that content, p2p technologies make it feasible for large files to be distributed extremely cheaply. Because the number of consumers is many, and the bandwidth cost of their consumption is shared, content that would be economically impossible to distribute through client-server distribution can be distributed using p2p practically freely. The architecture of p2p thus enables a kind of speech that would otherwise be economically infeasible.

The examples of such speech are many. Consider, for instance, the recent catastrophe caused by the Indian Ocean tsunami. Shortly after the disaster hit, websites across the world started facilitating the sharing of video files collected from

cant costs for the distributor. *See* Glenn Fleishman, *Blindsided by Bandwidth Fees*, Online Barkers Think Twice, NY Times, Apr. 24, 2003 at G8.

witnesses to the disaster. These files were large, and would have been extremely expensive to distribute by a traditional web-hosting method. Many of the providers of this content thus chose p2p technologies to enable the free spread of this urgent, and dramatic, content. Using BitTorrent, for example, one site was able to serve over 150 GB of content at a bandwidth cost of just 1.26 GB — approximately 0.8% of the total cost of distribution. *See* Torrentocracy Blog, *at* link # 8. Thus news that otherwise would not have spread was distributed because p2p technologies lowered the cost of such distribution dramatically.[8].

Such savings are important not just for noncommercial creators. They also enables commercial creators to distribute their own content far more efficiently. For example, the software company Linspire uses p2p technology to distribute its version of the GNU/Linux operating system far more inexpensively than the traditional client-server model of distribution would allow. According to Linspire President Michael Robertson, while the company's data-center has only a 100 MB capacity (which using client-server distribution could support 125 simultaneous users), by using BitTorrent, the company will be able to support "tens of thousands of users" when it distributes the next upgrade to its operating system, Linspire Five-O. Though each distribution is very large — over 600 MB — by sharing the distribution costs with its customers, Linspire can keep the cost of its software very low. *See Michael's Minutes*, Linspire, *at* link # 9.

P2P technologies have also inspired creators to offer their creative work in new, and different ways. Filmmaker Robert Greenwald, for example, has made the source interviews for his latest documentary available for free download using BitTorrent technology. *See* Torrentocracy Blog, *at* link # 10. These interviews are licensed under a Creative Commons li-

[8] Obviously, other sites also made video from the tsunami disaster available on the Net. But again, because of bandwidth cost, their clips were shorter and less comprehensive. *See* Clark Boyd, *Tsunami Disaster Spurs Video Blogs*, BBC News, Jan. 14, 2005, *at* link # 25.

cense that invites other filmmakers to use the interviews to make their own films. Thousands have downloaded these source files, made available through LegalTorrent, a BitTorrent site. The bandwidth costs to that site have been 0.4% of the total bandwidth costs incurred by this distribution. *See* Clive Thompson, *The BitTorrent Effect*, Wired, Jan. 2005, *at* link # 11. Without this savings, it would not be economically feasible for Greenwald to make his source material available on the Internet.

These innovations in the use of p2p technologies to date point to obvious, and important uses of p2p technologies tomorrow. There is a wide range of speakers who could use p2p technologies to spread video content who could not afford such distribution without it. Community colleges could use p2p technologies to aid distance education. Religious leaders could use p2p technologies to spread sermons. School boards could make video of regular board meetings available using p2p technologies — rather than running a radio station for that purpose, as is done in San Francisco. *See, e.g.,* KALW Information Radio, *at* link # 12. Political campaigns could enable the cheap distribution of campaign ads. Already, companies are beginning to offer p2p hosting to service precisely this type of demand. *See, e.g.,* Prodigem, *at* link # 13. If allowed to develop, many would offer similar services to enable similarly efficient distribution. While the Internet may have been a revolution for "cheap speech," *see* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805 (1995), "cheap speech" for video will exist only if p2p technology is common.

P2P technologies are also important for distributions beyond video. The recent announcement by Google of a project to digitize 20,000,000 books from major libraries around the country highlights one important limitation on such projects that p2p technology might help solve. David Vise, *Google to Digitize Some Library Collections*, Washington Post (Dec. 14, 2004), at E5 (describing Google project). High quality digital scans of books are very large files. A single 300 page book, for example, could produce a 2 gigabyte file. The cost of serving such files through the traditional client-server model is prohibitive

for many libraries. But were p2p technologies common, scanned public domain books could be made available through many digital library projects, as well as other large file archive resources, such as scans of original and ancient texts. *See, e.g.,* The Genizah Collection of Medieval Manuscripts, *at* link # 14.

Each of these uses of p2p technology advances fundamentally important free speech interests. As with the use authorized by Fred Rogers in *Sony*, in each instance, the technology advances free speech interests important to the copyright holders. These are not "fair uses," as the underlying use is authorized. But like the most important categories of "fair uses," each promotes a public value while enabling a private use. *See Sony*, 464 U.S., at 477-78 (Blackman, J., dissenting). The technology at issue in this case thus does not just enable people to get for free what they should otherwise should have to pay for. It also enables a kind of speech that otherwise could not economically exist.

II. THE CHOICE TO IMPOSE SECONDARY LIABILITY ON COMPANIES SUCH AS RESPONDENTS WOULD BURDEN THE SPREAD OF AUTHORIZED P2P CONTENT

Any decision by this Court imposing secondary liability on companies such as Respondents would, necessarily, restrict the spread of authorized p2p content. That consequence must be weighed by any policymaker deciding whether the benefit from (a) protecting commercial content by (b) burdening p2p technology outweighs its costs. The first and, Amicus submits, most important question for this Court to consider is whether this Court is the appropriate policymaker to make that choice of value.

P2P technologies are network goods. The more who use them, the more valuable they become. *See United States* v. *Microsoft Corp.*, 253 F.3d 34, 49-51 (D.C. Cir., 2001) (describing network goods). Conversely, the less ubiquitous p2p technologies are, the less useful they become for distribution. A decision by this Court imposing secondary liability on Respondents would chill the spread of these technologies by inducing other institutional actors — from ISPs, to universities — to take

steps to avoid their own secondary liability. This result is certain because, given the architecture of Internet traffic, there is no simple or effective way to determine whether or not shared content is shared with authorization and, in turn, to block the content that is not. The simplest response for many is therefore to disable p2p technologies, as many universities, under pressure from content owners, are currently undertaking to do. The decision to expand secondary liability in this context is thus in effect a decision to favor some speech over other speech — that is, speech that can afford client-server distribution technologies over speech that depends upon p2p.

Historically, this Court has been especially sensitive to legal rules that impose costs blocking access to important speech opportunities. This was a central concern of the Court in *Reno* v. *ACLU,* 521 U.S., at 870 ("[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."). It was also one reason that this Court rejected that statute's technological safe harbors. *Id.* at 881 ("not economically feasible for most noncommercial speakers."). *See* also *Ashcroft* v. *ACLU,* 535 U.S. 564, 595 (2002) (Kennedy, J., concurring in the judgment) ("it is easy and cheap to reach a worldwide audience on the Internet, but expensive if not impossible to reach a geographic subset").

The same concern also has guided this Court's review of regulations that burden speech beyond the Internet. In *Watchtower Bible and Tract Society of New York* v. *Village of Stratton,* 536 U.S. 150 (2002), for example, this Court invalidated on First Amendment grounds a village ordinance banning door-to-door advocacy without a solicitation permit. As Justice Stevens wrote for the Court, "because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door." *Id.* at 160-61. *See also Martin* v. *City of Struthers,* 319 U.S. 141, 146 (1943) ("[d]oor t door distribu-

tion of circulars is essential to the poorly financed causes of little people"). So too did this Court invalidate rules banning yard-signs, *see City of Ladue* v. *Gilleo,* 512 U.S. 43, 57 (1994) ("[e]specially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute"), leafleting, *see McIntyre* v. *Ohio Elections Commission,* 514 U.S. 334, 358 (1995) (Ginsburg, J., concurring) (describing burden on "individual leafleteer"), and billboards, *see Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490, 516 (1981) ("[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive."). *See generally* Molly Shaffer van Houweling, *Distributive Values in Copyright,* 83 TEXAS L. REV. ____ (2005), *at* link # 15.

But in the context of copyright regulation, the consequence of recognizing that secondary liability would affect fundamentally important free speech interests is not that such rules are necessarily unconstitutional. Such a recognition instead simply signals the appropriate forum for resolving the conflict presented by such rules — that institution granted special constitutional deference for its judgments weighing the speech interests affected by copyright law, namely Congress.

This case is plainly not one in which the only interests burdened by a new rule of liability would be the interests of copyright infringers. Affected as well are the interests of plainly legitimate speakers. If Dan Rather decides to distribute weekly news commentary across the Internet, no doubt his production company could afford the costs of client-server distribution. But if this Court creates a rule that effectively smothers p2p technologies broadly, then that rule will deny the same opportunity to church leaders, school boards, local community organizations, and any one else who might use the medium of the Internet to distribute large media files inexpensively.

The balance that must be struck among the interests affected in this case is made even more difficult by the many embedded assumptions that any such balance must reckon. For example, just as parents in the context of Internet pornography can take steps to pr[illegible]t their children from inappropriate content, *see,*

Ashcroft v. *ACLU*, 124 S. Ct. 2783, 2792 (2004) ("[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them"), so too could content owners take steps to protect their content from the possible costs of infringement imposed upon them by p2p file-sharing. Some techniques of encryption, for example, could make commercially available content effectively immune from the burdens of p2p file sharing.[9] Indeed, with such technologies, content owners would actually *benefit* from p2p file-sharing since it could reduce the cost of distributing their content.

Commercial content owners have been slow to adopt these self-help technologies, fearing the burden of such technology would too significantly restrict their markets. That decision may well be rational *for them*. But a policy choice about p2p must determine whether the gain to speakers from free access to p2p technology outweighs any loss on the margin to content owners from the extra burden of self-protection through encryption. Resolving that balance is no doubt complex. But resolving it is essential if a proper balance is to be struck. That essential step in resolving this case signals again the appropriate forum for its resolution — not this Court.

This complex balance cannot be short-circuited by, for example, a simple rule requiring that p2p technologies only permit sharing of content explicitly marked for sharing. Not only are such rules unlikely to be effective, they would also destroy the utility of systems, such as the one developed by Creative Commons, to meaningfully mark content as available for free or derivative use.

[9] Again, the kind of encryption intended here is "token" based encryption. *See supra* note 6. Existing DVDs, for example, are protected by a type of encryption technology that is different. Once that technology is cracked, any number of DVDs can be copied illegally. *See Universal City Studios, Inc.* v. *Corley*, 273 F.3d 429, 436-40 (2d Cir. 2001) (describing CSS encryption technology).

Early experience with censorship on USENET evinces this point directly. In 1996, because of the requirements of the German government, Compuserve started blocking USENET groups that were associated with pornography.[10] That action had a predictable effect: groups not associated with pornography were flooded with pornographic images and content, as pornographers sought a way to evade the restrictions that Compuserve had imposed. Closing a channel to pornographers induced them to flood other legitimate channels for distributing other, non-pornographic content.[11]

Amicus fears the same result would follow if the law effectively required that only content "marked for sharing" be allowed to be shared on p2p networks. Many who would continue to want to share content without the permission of the copyright holder would simply adopt Creative Commons tags to enable falsely "authorized" sharing. That would dilute the value of genuinely licensed content. And while Creative Commons has taken steps to make it possible to de-authorize licenses that are falsely asserted, that process is relatively cumbersome. An effective requirement that only content marked to be shared can be shared could then destroy the possibility of an authentic and useful signal of content that can, legally, be shared.

Creative Commons acknowledges that in the end its interests, or the interests of those who use Creative Commons licenses, or the interests of those who would depend upon wide adoption of p2p technologies to spread their creative work, may be found to be less significant than the interests of commercial copyright holders. In the balance of interests that copy-

[10] *See* Jon Auerbach, *Fences in Cyberspace: Governments Move to Limit Free Flow of the Internet*, Boston Globe, Feb. 1, 1996, at 1; David Johnson & David Post, *The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1373 n.20 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 Stan. L. Rev. 1403, 1405-06 (1996).

[11] A similar dynamic is described in Leslie Regan Shade, *Desperately Seeking Karla: the Case of alt.fan.karla.homolka*, Proceedings of the Canadian Association for Information Science, 22nd Annual Conference, May 25-27, 1994, McGill University:109-126, *at* link # 26.

right law must necessarily strike, there are always some who benefit more than others. But there can be no doubt that extending secondary liability in this case is a choice to burden one set of interests over another. That fact, Amicus submits, renders the choice inappropriate for Courts.

III. THE CHOICE TO IMPOSE SECONDARY LIABILITY ON COMPANIES SUCH AS RESPONDENTS WOULD RESTRICT THE DEVELOPMENT OF A WIDE RANGE OF TECHNOLOGIES

A decision by this Court to create secondary liability for companies such as Respondents would also, unavoidably, restrict the development of a wide range of legal technologies. This is because any such decision cannot help but create a legal uncertainty that competitors can exploit, thereby raising investor risk, and reducing investment in content-related innovation. Any policy decision to create such liability must therefore also take these costs into account. This point again signals that Congress is the appropriate forum for such considerations to be reckoned.

This uncertainty is of special concern to Amicus. Our licenses are currently being integrated into many different technologies for producing and legally sharing content. These include p2p clients, such as Limewire and Morpheus. As with any tool, these technologies could also be abused. If this Court were to expand secondary liability in the context of p2p technology, firms might well shift away from using our licensing technology, despite its legitimate ends. Mere uncertainty in this context imposes a cost on such innovation affecting the distribution of copyrighted content.

Avoiding the cost of this uncertainty was no doubt one objective of this Court's rule in *Sony*. By asking *not* whether the benefit from new uses outweighs the cost of infringement, but *instead* whether the technology is "capable of substantial noninfringing uses," this Court's rule assured that most new technologies would not be subject to the burdens of expensive secondary liability lawsuits before, or upon, entering the market. 464 U.S., at 442. By preserving the default of no regulation, at least until Congress deliberates and acts, this Court's rule preserves the widest range of possible innovation. If Congress subsequently decides that the cost of a new technology outweighs its benefits, Congress may regulate that technology directly. Congress has done this in a number of cases. *See, e.g.*, Audio Home Recording Act of 1992, 17 U.S.C. §1001 (2005). It has declined to do so in others. *See* James Lardner, *Fast Forward* 277-303 (1987) (describing Congress's refusal to adopt levies on tapes after *Sony*). But the rule of *Sony* is designed to keep federal judges out of the role of weighing the costs and benefits of a new technology as a condition of that technology's permission to enter the market.

This Court should recognize, however, that even under the pro-innovation standard of *Sony*, there is still a substantial opportunity for abuse and uncertainty in this area of the law. The case of ReplayTV, for example, is an instance of such abuse. *Paramount Pictures Corp.* v. *ReplayTV*, 298 F. Supp. 2d 921 (C.D. Cal., 2004).

ReplayTV is a digital version of the VCR. It is similar to the better known "TiVo" — a technology that FCC Chairman Michael Powell has referred to as "God's machine." *See* Lauren Weinstein, *TiVo: The Rise of "God's Machine,"* Wired News, Feb. 3, 2003, *at* link # 16. As with the VCR, the digital video recorder (DVR) enables consumers to record television shows. As with the VCR (at least as Jack Valenti testified, *see Home Recording of Copyrighted Works – Hearings Before the House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 97th Cong. (Apr. 12, 1972)), it enables consumers to skip commercials. And as with the VCR, it enables consumers to archive favorite television content. The one additional feature that the ReplayTV DVR added was the ability for one ReplayTV subscriber to send recorded shows to other ReplayTV subscribers.[12] But as it could take *days* using this function for a single film to complete its transfer, it was actually slower than recording a show on a VCR and mailing the tape to a friend.

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[12] Pay-per-view, and other premium content, was excluded from this feature.

A plain reading of *Sony* would have strongly suggested that if the VCR was not an infringing technology, neither was the DVR. As with the VCR, the primary objective was time-shifting. As with the VCR, there were plainly copyright holders who were happy that people record their content. Nothing in the calculus that this Court identified in *Sony,* in other words, had changed. Yet some of the very same copyright holders who had attacked the VCR in 1976 succeeded in tying up ReplayTV in court for almost 18 months. The cost of litigating this question was estimated to be $3,000,000 per quarter. Benny Evangelista, *Piracy Suits Chill Valley*, S.F. Chron., Feb. 20, 2003, at B1, *at* link # 17. Eventually, ReplayTV was forced into bankruptcy. Benny Evangelista, *Sonicblue Goes into Chapter 11,* S.F. Chron., Mar. 22, 2003, at B1.

This lesson has not been missed by venture capitalists in Silicon Valley. If there is a chance that content owners can use litigation to challenge a new technology, then that uncertainty will stifle investment in that technology and directly affect design choice. Katie Dean, *Summit: DMCA Blocks Tech Progress*, Wired News, Feb. 20, *at* link # 18. The critical point, as Judge Posner and William Patry have observed in the context of "fair use" protections, is that *even if a technology would ultimately be found to be legal*, the costs of litigating to that conclusion are often enough to staunch new innovation. William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 Calif. L. Rev. ___ (forthcoming, 2004). The threat of suit will either drive new, legal innovation out of the market, or — and perhaps worse — it will empower existing monopolies to set the terms upon which competition in their markets is allowed. As one CEO described, "If I'm in a product meeting and I'm offered a choice between two features, one which will trigger a lawsuit and one not, I'm inclined to choose the one that will not, even if our lawyers think we can win." Claire Tristram, *Hollywood's War on Innovation*, Salon.com, Sept. 9, 2002, *at* link # 19.

Any vague or complex legal standard of secondary liability will necessarily produce this result. And it is for this reason in particular that the clever, or more accurately, academic tests

proposed to this Court by both economists and courts should be viewed with extreme skepticism. *See, e.g.,* Brief of Amici Curiae Kenneth J. Arrow, et al., in Support of Petitioners, *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster, Ltd.*, No. 04-480 (Jan. 24, 2005*); In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir., 2003). Whether or not Professor Epstein's prescription for regulation makes sense generally, *see Richard Epstein, Simple Rules for a Complex World* (1995), it has a special appeal in the context of judicial regulation affecting speech and innovation: Any standard that cannot easily be resolved on summary judgment will have the practical effect — as distinct from any theoretical or academic effect — of giving to existing industries a veto over new innovation. No startup can afford 18 months of litigation to establish its right to innovate. The choice of a complicated, summary judgment-proof standard of secondary liability, is therefore, necessarily, a policy choice that burdens new forms of innovation.

IV. FOR THE REASONS ARTICULATED BY THIS COURT IN *SONY* THESE POLICY CHOICES ARE PROPERLY LEFT TO CONGRESS

Amicus has identified two costs that any new standard for secondary liability in the context of p2p technologies will necessarily create: first, such a standard will burden legally shared content that depends upon p2p architectures for cheap distribution, and second, such a standard will stifle innovation in valuable technologies that also might be used to infringe existing rights-holders' property.

These costs must be reckoned by the policymaker charged with effecting the balance that copyright law strikes between protection and access. That policymaker is Congress. If Congress's judgment weighing the free speech interests affected by its regulation deserves special deference, *Eldred*, 537 U.S., at 205 ("defer substantially to Congress"), then it is Congress that should have the initial responsibility of weighing the free speech interests affected by the regulation of copyright law. Deference to Congress's balance requires at least that it is Congress that does the balancing.

This was the clear implication of *Sony*. The issue in that case is functionally identical to the issue presented here. Petitioner Sony defended a technology that the Respondents claimed was used primarily to infringe copyrights. Brief of Respondents, Universal City Studios, Inc., and Walt Disney Productions, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, n.114 (1984) (No. 81-1687) (claiming that "over 80% of all Betamax recordings consists of protected entertainment programs" and that less than 9% of the programs recorded were legitimately recorded with the permission of the copyright holder). Indeed, the proportion of infringement alleged in that case was *greater* than the infringement at issue in this case. *Compare* Brief of Respondents, Universal City Studios, Inc., and Walt Disney Productions, *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, n.114 (1984) (No. 81-1687) (asserting that greater than 91% of Betamax recordings were infringing) *with* Brief for Motion Picture Studio and Recording Company Petitioners, *Metro-Goldwyn-Mayer Studios, Inc.* v. *Grokster, Ltd.*, No. 04-480 (Jan. 24, 2005) (asserting that greater than 90% of the activity on the Grokster service is infringing).[13] Nonetheless, as this Court held over a strong and clear dissent, the judicial question was *not* whether the benefits of Sony's technology outweighed the cost, but *instead* whether the technology was "capable of substantial noninfringing uses." 464 U.S., at 442.

Such deference is especially important in the context of copyright regulation for three distinct reasons.

1. Historically, the ordinary tools for accommodating changes in technology to copyright interests are tools for a legislature, not a court. Congress has accommodated such changes in the past using (1) compulsory licenses, *see, e.g.*, 17 U.S.C. §115 (2005) (compulsory license for nondramatic recordings), (2) narrowly crafted technological mandates, *see, e.g.*, Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001, 1002 (2005) (mandates covering DAT technology), and (3) safe-harbor

[13] As Respondents have argued, the figure of "90%" is itself exaggerated. *See* Br. Resp. at 9-10 n.6.

provisions to temper any overbreadth in a general rule, *see, e.g.*, Digital Millennium Copyright Act of 1998, 17 U.S.C. §512(c)(1) (defining safe harbor for ISPs). Obviously, those legal devices are unavailable to courts. A court cannot draft a compulsory license, nor legislate either a technology mandate or safe-harbor provision. The only remedy available to a court is liability under the existing rules.

2. That liability, in turn, suggests a second reason why it should be Congress that addresses new technologies, and not the courts. Under the law as it is today, a court is required to impose statutory damages upon a finding of liability for the infringement of registered works. 17 U.S.C. §504(c). Because statutory damages are so extreme, they often are a death penalty for a corporation innovating around technologies affecting content. One example is the case of MP3.COM. That company was found to have infringed various copyrights when it produced a technology to enable consumers to access from more than one computer music that they had purchased. That result has been questioned, *see* William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 120-21 (2003). But because the law requires statutory damages, which in this case ranged between $118,000,000 and $250,000,000, the effect of that liability was to force MP3.COM out of business. *See UMG Recordings* v. *MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); Lessig, *Free Culture*, *supra*, 190. Adding secondary liability to the possible grounds upon which statutory damages could be imposed would only exacerbate the likelihood of this consequence.

3. Finally, any rule crafted by this Court would necessarily affect technologies that are not now before this Court. This is the nature of judicial decisions. Congress, by contrast, is free to tailor its rules to the technologies it is currently addressing. That means Congress, as an institution, is better able to avoid the unintended consequences of legal regulation than is this Court.

These reasons confirm the judgment in *Sony* that a technology is free of secondary liability even if it is only "capable" of substantial noninfringing uses — that is, regardless of the cur-

rent proportion of legal versus illegal uses. 464 U.S., at 442. Yet Petitioners in this case insist that the Court in *Sony* must have intended some judgment of proportionality. As Petitioner writes, "*Sony-Betamax* calls for a balance between 'effective' – and not merely symbolic – 'protection' of copyright, and 'the rights of others freely to engage in substantially unrelated areas of commerce.'" Pet'r. MGM Studios Br. at 2. *See also id.* at 17 ("*Sony-Betamax* requires balance."); 23 ("must reflect a balance"); 27 ("the Court balanced the interests"); 35-36 ("far from striking a balance"); 50 ("the balance struck in *Sony-Betamax*").

But "balance" was emphatically *not* what this Court did in *Sony*. The Court was quite clear that the cases did not require an "explor[ation of] all the different potential uses of the [VCR]," *Sony*, 464 U.S., at 442 — an exploration that would be required if "balance" was the objective. Instead, as the Court stated, the case was to be resolved "on the basis of the facts as found by the District Court." Those facts were incomplete, if a "balance" was a required. As Justice Blackmun made plain in dissent, "the District Court declined to make findings on the 'percentage of legal versus illegal home-use recording.'" 464 U.S., at 492 (Blackmun, J., dissenting). Thus, it was absolutely clear that the judgment of this Court in *Sony* did not purport to weigh or "balance" the policy questions at stake in light of all the facts about potential uses. Nor did it purport to decide that one use was more valuable than the other — that enabling access to "Mister Rogers' Neighborhood," for example, was more important than Disney's copyrights. Instead, as this Court framed the question, the relevant inquiry was effectively jurisdictional — if the technology was "capable of substantial noninfringing uses," then the matter was one for Congress. 464 U.S., at 442.

Petitioners insist that such a rule makes no sense because "then every product or service used for reproduction or distribution of copyrighted works would be entitled to the staple article of commerce defense." Pet'r. MGM Studios Br. at 36. But again, precisely the same point was raised by Justice Blackmun in dissent. As he wrote, "[s]uch a definition essentially eviscerates the concept of contributory infringement. Only the most unimaginative manufacturer would be unable to demonstrate that a image-duplicating product was 'capable' of substantial noninfringing uses." 464 U.S., at 448 (Blackmun, J., dissenting). With all due respect to the late-Justice Blackmun, the *Sony* rule does not "eviscerate" anything: it simply shifts the appropriate forum for determining the rule of contributory infringement from the courts to Congress. But that Justice Blackmun made this point so clearly indicates that the consequence of this Court's decision was clear.

Sony announced a rule of deference. "[W]hen major technological innovations alter the market for copyrighted materials," 464 U.S., at 431, creating a "calculus of interests" never contemplated by Congress, *id.*, courts should leave it to Congress to rebalance those interests. This rule of deference should apply whenever a technology *either* (A) enables a broad range of authorized speakers to spread their speech, *or* (B) enables a broad range of "fair uses" of existing copyrighted speech. P2P technologies do both, but they certainly enable a broader range of authorized speakers to spread their speech than the VCR. For this reason alone, this Court should affirm the decision of the Ninth Circuit.

CONCLUSION

Creative Commons was made possible by technologies developed in the shadow of the *Sony* Court's decision that the regulation of technology affecting copyrighted speech is a matter for Congress. Indeed, many of the technologies affecting speech that this Court has spoken of so warmly — as well as the technologies that might save the content industry, such as the iPod — were developed in the shadow of the safe harbor that the *Sony* rule produced. So far Congress has chosen to leave that rule unchanged.

Creative Commons takes no position on whether to favor commercial copyrighted speech over noncommercial copyrighted speech; on whether to favor the band Tsunami over the tsunami videos; or on whether to favor a speech technology optimized for the distribution of Madonna songs over technologies that enable a searing video about hunger in Africa to

spread freely. Indeed, Creative Commons takes no position on which rule, or which legal structure for the creation of communications technology, would in the end produce an optimal social outcome.

Creative Commons does respectfully submit, however, that given the absence of a secondary liability scheme in the Copyright Act itself, only Congress is institutionally fitted and constitutionally enabled to make the choices of value between types of speech and types of technology for the distribution of speech. If *Eldred* stands for the deference that Congress is owed for its judgment about the conflict of free speech interests affected by copyright, then this case should stand for the responsibility that Congress has as well: If a technology produces a conflict among free speech values affected by copyright, then it is Congress that should "balance" those interests.

Respectfully submitted,

LAWRENCE LESSIG
(Counsel of Record)

APPENDIX

Appendix A

The distribution of Creative Commons licenses, as indicated by link-backs from the Yahoo! Search database as of February 18, 2005, is as follows:

License Name	Percentage
Attribution	7.9%
Attribution-NonCommercial	7.4%
Attribution-NonCommercial-NoDerivatives	27.5%
Attribution-NonCommercial-ShareAlike	36.2%
Attribution-NoDerivatives	3.5%
Attribution-ShareAlike	11.3%
NonCommercial	1.7%
NonCommercial-ShareAlike	0.5%
NoDerivatives	0.1%
NoDerivatives-NonCommercial	0.3%
ShareAlike	1.3%
Public Domain	2.2%

Each line lists the requirements for a particular license. "Attribution" means a license that requires Attribution. "NonCommercial" means that only noncommercial uses of the content are authorized. "No-Derivatives" means derivative works are not authorized. "Share-Alike" means that any authorized derivative works must be released under a similar license.